TAKAKO SAKAO A

v.

NG PEK YUAN & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA B
SURIYADI HALIM OMAR JCA
WAN ADNAN MUHAMAD JCA
AHMAD MAAROP JCA
[CIVIL APPEALS NOS: W-01-99-05 & W-02-1236-05]
10 DECEMBER 2008 C

LAND LAW: *Caveats - Caveatable interest - Whether foreign purchaser having caveatable interest as no state authority approval was obtained when purchasing property for restaurant business - Whether registered co-purchaser entitled to sell property - Whether share held under a resulting trust - Whether only actual sum paid recoverable - National Land Code, ss. 433B(1)(c), (aa), (ab), (ac), 433C* D

LAND LAW: *Indefeasibility of title and interests - Foreign purchaser - Whether having caveatable interest as no state authority approval was obtained when purchasing property for restaurant business - Whether registered co-purchaser entitled to sell property - Whether share held under a resulting trust - Whether only actual sum paid recoverable - National Land Code, ss. 433B(1)(c), (aa), (ab), (ac), 433C* E

The appellant, a Japanese citizen residing in Japan and the 1st respondent purchased a shop ('the property') to set up a Japanese restaurant in Malaysia. The appellant paid RM65,450 towards the purchase of the property and also claimed to have contributed towards the share capital of the restaurant. The appellant then discovered that the property was registered in the sole name of the 1st respondent and lodged caveats against the property. The 1st respondent subsequently entered a sale and purchase agreement to sell the property but could not execute the memorandum of transfer to the intended purchaser due to the caveats. The appellant then brought an action against the 1st respondent claiming, *inter alia*, that the property was held in trust for her and the appellant; the proceeds of the sale of the property should be distributed accordingly between them; and for an injunction to restrain the 1st respondent from selling the property until the disposal of the action. The 1st respondent too filed an action against the appellant to remove the caveats lodged against F G H I

A the property. Both actions were heard together and the High Court decided against the appellant in both of them. However, the 1st respondent was ordered to pay the appellant the sum of RM65,450 contributed by the appellant towards the payment of the property. The appellant, in two separate appeals, appealed
B against the decisions in both the actions. The parties agreed that the appeals be heard simultaneously. The issues were whether the 1st respondent held the appellant's share under a resulting trust; and whether the appellant had a caveatable interest to sustain the caveats lodged.

C

Held (dismissing the appeals)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

D **(1)** The appellant failed to obtain the prior written approval of the state authority as required under s. 433B(1) read together with s. 433C of the National Land Code ('NLC'). The appellant was beneficially entitled under the resulting trust over the property acquired by the first respondent but no evidence
E was adduced that the dealing was prior to 1 January 1993 or that her case fell under s. 433B(1)(aa), (ab) and (ac). Therefore, her attempt to lodge any caveat must fail without the relevant approval. The caveats must be removed. (para 23)

(2) The Torrens system, the very foundation of the NLC, was a
F complete bar to the attempts of the appellant to caveat her interest unless the strict demands were complied with. With the promulgation of the amended provision, any failure to comply with the strict requirements could not be tempered with equity. Nevertheless, it did not exclude the court's
G jurisdiction to grant judicial relief in a claim *in personam* founded in law or in equity. (para 24)

(3) A resulting trust was created when the moneys were funneled to the 1st respondent. The appellant had entrusted her
H contribution with the 1st respondent expecting her share and contribution to be used for her benefit in the joint venture. The fact that she was in Japan away from the hub of the business, let alone the fact that the 1st respondent persuaded her to part with her money, showed that the 1st respondent
I was expected to register her as the co-owner of the property in the business venture. The appellant still retained her

proprietary rights, whether expressly or by implication, never intending that her beneficial interest be taken away from her and that the interest in the contribution to eventually revert to her on demand. This was a business venture with profit uppermost in mind. Charity had no place in such a background. (para 25)

(4) The 1st respondent did not adduce any evidence to rebut the creation of the resulting trust. The appellant's contribution was never established as a loan for the benefit of the 1st respondent. The resulting trust was a valid legal interest in law. (para 26)

(5) The appellant was entitled to the benefits of the business venture and the protection of the law. In the event of breach by the 1st respondent, the courts would render assistance to the appellant, as equity would not suffer a wrong to be without remedy. (para 27)

(6) There was no evidence of any illegal intent on the part of the appellant when she agreed to the entrepreneurial undertaking. Nor was there any evidence adduced to establish that she was aware of any legal impediment causing her share to be exposed and unprotected. Matters came to head only when she discovered that she was not a registered co-owner of the property after a search was carried out. She later came to know too that the property was to be sold to Glamour Land, a company which was partly owned by the husband of the 1st respondent. (para 28)

(7) The appellant faced a statutory wall when she failed to obtain the required authorisation. The appellant was caught by the restrictions in ss. 433B(1)(c) and 433C NLC with the former provision being wide enough to cover her predicament as she was a non-citizen beneficiary of an alienated land. With the appellant's failure to comply with the above provisions, hence prohibiting the appellant from having a caveatable interest, the 1st respondent would be permitted to sell the property to whoever she wishes. (para 29)

(8) Even though a resulting trust had been created when the 1st respondent received the contributions from the appellant, the appellant failed to establish her share of the value of the

property. In the circumstances, the appellant's claim would have to be confined to recovery of actual sums of money contributed by her to the 1st respondent. Even though the 1st respondent failed to appear at the trial and all allegations made against her were deemed to be admitted, there was sufficient rebuttable evidence to reduce the claimed sum to that of RM65,450 only. The appellant had established by evidence her contribution in the sum of RM65,450 towards the purchase of the property. (paras 30, 31 & 32)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang warganegara Jepun yang menetap di negara Jepun dan responden pertama membeli sebuah kedai ('harta tanah tersebut') bagi tujuan mendirikan sebuah restoren Jepun di Malaysia. Perayu menyumbang RM65,450 terhadap harga pembelian harta tanah tersebut dan juga mendakwa telah menyumbang kepada syer kapita restoren tersebut. Perayu kemudiannya mendapati bahawa harta tanah tersebut didaftarkan dalam nama responden pertama sahaja dan seterusnya memasuki kaveat terhadap harta tanah tersebut. Responden pertama kemudiannya menandatangani satu perjanjian jualbeli bagi tujuan menjual harta tanah tersebut tetapi tidak dapat melaksanakan memorandum bertukar milik dengan pembeli berkenaan disebabkan kaveat tersebut. Perayu kemudiannya membawa tindakan terhadap responden pertama menuntut, *inter alia*, bahawa harta tanah tersebut diamanahkan untuknya; wang daripada jualan harta tanah tersebut mesti dibahagikan sesama mereka; dan untuk injunksi menahan responden pertama daripada menjual harta tanah sehingga penyelesaian tindakan. Responden pertama pula memfailkan tindakan terhadap perayu untuk mengeluarkan kaveat yang dimasukkan terhadap harta tanah tersebut. Kedua tindakan didengar bersama dan Mahkamah Tinggi memberi keputusan tidak memihak perayu dalam kedua tindakan tersebut. Responden pertama diperintah membayar perayu jumlah RM65,450 yang disumbangkannya terhadap pembelian harta tanah tersebut. Perayu, dalam dua rayuan berasingan merayui keputusan kedua tindakan tersebut. Pihak-pihak telah bersetuju untuk rayuan-rayuan didengar serentak. Isu-isunya adalah sama ada responden pertama mengamanahkan bahagian perayu di bawah amanah berbangkit; dan sama ada perayu mempunyai kepentingan yang boleh dikaveatkan untuk kaveat dipertahankan.

Diputuskan (menolak rayuan-rayuan)
Per Suriyadi Halim Omar HMR menyampaikan keputusan mahkamah:

(1) Perayu gagal memperolehi kelulusan terlebih dahulu daripada pihak berkuasa negeri seperti yang diperlukan oleh s. 433B(1) dibaca bersama dengan s. 433C Kanun Tanah Negara ('KTN'). Perayu berhak secara benefisiari di bawah amanah berbangkit terhadap harta tanah yang diperolehi responden pertama tetapi tiada keterangan yang dikemukakan bahawa transaksi berkenaan berlaku sebelum 1 Januari 1993 atau kesnya jatuh di bawah s. 433B(1)(aa), (ab) dan (ac). Dengan itu, usahanya untuk memasuki kaveat mesti gagal tanpa kebenaran berkenaan. Maka, kaveat-kaveat mesti dikecualikan.

(2) Sistem Torrens iaitu dasar Kanun Tanah Negara mengalang sepenuhnya usaha-usaha perayu mengkaveatkan kepentingannya kecuali jika tuntutan-tuntutan ketat diikuti. Dengan peruntukan pindaan yang terpakai, mana-mana kegagalan mengikuti kehendak-kehendak ketat tidak boleh dicampurtangan ekuiti. Namun demikian, ianya tidak mengecualikan bidang kuasa mahkamah untuk memberikan kehakiman relief dalam tuntutan *personam* berasaskan undang-undang atau ekuiti.

(3) Suatu amanah berbangkit timbul apabila wang berkenaan disalurkan kepada responden pertama. Perayu mengamanahkan sumbangannya kepada responden pertama mengharapkan bahagian dan sumbangannya itu digunakan untuk manfaatnya dalam urusan perniagaan gabungan itu. Fakta bahawa responden pertama berada di Negara Jepun maka terkeluar daripada hab perniagaan itu dan termasuk fakta bahawa responden pertama telah memujuknya menyerahkan wangnya itu, menunjukkan bahawa responden pertama berharap didaftarkan sebagai pemunya bersama harta tanah dalam urusan perniagaan itu. Perayu masih mengekalkan hak-hak keempunyaannya, sama ada secara nyata atau secara implikasi, tiada bermaksud kepentingan benefisialnya diambil daripadanya dan kepentingan sumbangannya diberikan kemudian atas tuntutannya. Ini adalah suatu urusan perniagaan gabungan bagi maksud keuntungan. Tiada tempat untuk dermaan dalam hal keadaan itu.

A **(4)** Responden pertama tidak mengemukakan mana-mana keterangan untuk mematahkan ketimbulan amanah berbangkit. Sumbangan perayu tidak dibuktikan sebagai satu pinjaman bagi keuntungan responden pertama. Amanah berbangkit itu merupakan satu kepentingan di sisi undang-undang yang sah.

B

(5) Perayu berhak untuk keuntungan kepentingan perniagaan gabungan dan perlindungan undang-undang. Jika terdapat kemungkiran oleh responden pertama, mahkamah akan memberi pertolongan kepada perayu kerana ekuiti tidak akan
C membiarkan suatu kesalahan tanpa remedi.

(6) Tidak ada apa-apa keterangan menunjukkan niat perayu menyalahi undang-undang apabila bersetuju kepada pengusahaan keusahawanan itu. Tiada juga apa-apa keterangan
D dikemukakan untuk membuktikan yang dia mengetahui apa-apa halangan di sisi undang-undang mengakibatkan bahagiannya didedah dan tiada dilindungi. Perkara-perkara muncul hanya apabila dia dapat mengetahui bahawa dia bukan pemunya bersama harta tanah yang telah didaftarkan selepas suatu
E pencarian dilaksanakan. Dia kemudiannya dapat mengetahui bahawa harta tanah tersebut akan dijual kepada Glamour Land, sebuah syarikat milikan separuh suami responden pertama.

(7) Perayu menghadapi halangan statutori apabila gagal
F memperolehi kelulusan berkenaan. Perayu tertangkap dengan sekatan-sekatan ss. 433B(1)(c) dan 433C KTN dengan peruntukan terdahulu cukup merangkumi hal keadaan sukarnya kerana dia benefisiari bukan warga negara tanah berimilik. Dengan kegagalan perayu mengikuti peruntukan-peruntukan
G tersebut, maka perayu tiada kepentingan kaveat dan responden pertama dibenarkan menjual harta tanah tersebut kepada sesiapa yang diingininya.

(8) Walaupun suatu amanah berbangkit timbul apabila responden
H pertama menerima sumbangan-sumbangan daripada perayu, perayu gagal membuktikan bahagiannya daripada nilai harta tanah tersebut. Dalam keadaan demikian, tuntutan perayu mesti dihadkan kepada mendapatkan kembali wang sebenar yang disumbangnya kepada responden pertama. Walaupun
I responden pertama gagal menghadiri mahkamah dan semua dakwaan-dakwaan terhadapnya disifatkan diterima, terdapat

keterangan pematahan mencukupi bagi menurunkan jumlah tuntutan kepada RM65,450 sahaja. Perayu dapat membuktikan sumbangannya setakat RM65,450 terhadap pembelian harta tanah tersebut.

Case(s) referred to:
Abdul Karim PUK Mohamed Seeni v. Tahir Yaacob & Anor [2004] 3 CLJ 424 CA ***(refd)***
Chai Kim Chong v. Barnwood Sdn Bhd [1994] 2 MLJ 56 ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng [1995] 2 CLJ 713 CA ***(refd)***
Palaniappa Chettiar v. Arunasalam Chettiar (No 2) [1962] AC 294 ***(refd)***

Legislation referred to:
National Land Code, ss. 323(1), (3), 433B(1)(c), 433B(1)(aa), (ab), (ac), 433C

Other source(s) referred to:
Mary George, *Malaysian Trust Law,* p 221

(Civil Appeal No: W-01-99-05)
For the appellant - Manjit Singh Saini (Balbir Singh with him); M/s Harun Idris Yeoh & Partners
For the 1st respondent - In Person
For the 2nd respondent - Mohammad Al-Saifi Hj Hashim (Shamsurraty Shamsuddin with him) A-G's Chambers

(Civil Appeal No: & W-02-1236-05)
For the appellant - Manjit Singh Saini (Balbir Singh with him); M/s Harun Idris Yeoh & Partners
For the 1st respondent - In Person
For the 2nd respondent - Goh Siu Lin; M/s Shook Lin & Bok
For the 3rd respondent - S Parameswary (Devan Mahalingam & K Geetha with him); M/s Tay, Tee & Nasir

For the High Court, Kuala Lumpur; Originating Summons No: S1-21-28-1998 & Civil Suit No: S(1)-22-208-1996]

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar JCA:

[1] On 7 May 1996 Takako Sakao (f) (hereinafter referred to as the appellant), and one Kiku Toyatake as the second plaintiff, had filed Civil Suit S(1)-22-208-1996 (referred to as 'the writ') against

A one Ng Pek Yuen (f) (hereinafter referred to as 'the first respondent') at the Kuala Lumpur High Court. Later Phileo Allied (Malaysia) Bank Berhad, to be taken over by Malayan Banking Berhad intervened, to be added as a second defendant in 1998. On 11 October 2004 the third respondent ie, Glamour Land Sdn B Bhd intervened and was added as the third defendant.

[2] The appellant claimed against the first respondent for the following orders:

C a) a declaration that the first respondent held a piece of property under H.S.(D) 71434 for Lot No. PT 3578 in the Mukim of Kuala Lumpur (hereinafter referred to as 'the property') as trustee for the joint beneficial interest of herself and the appellant;

D b) an order for sale of the property with the net proceeds to be distributed accordingly between the first respondent and the appellant;

c) an injunction restraining the first respondent and/or her agents E and servants from selling, transferring and/or in any manner dealing with and/or disposing on the property until the final disposal of the suit;

d) specific and general damages;

F e) an inquiry be carried out of all accounts in connection with the business of the Japanese restaurant;

f) an order that the first respondent do pay to the appellant all sums due to her from the property;

G g) damages for breach of contract and/or trust;

h) damages for hurt feelings anxiety and mental distress;

i) interest;

H j) costs to be taxed; and

k) such further or other reliefs as the court may deem fit and proper.

I

[3] On 12 March 1998 Originating Summons S1-21-28-1998 (or the 'saman pemula') was filed by the first respondent against the Pendaftar Hakmilik Tanah Wilayah Persekutuan Kuala Lumpur, the appellant, and Manjit Singh Saini in order to remove caveats lodged on the property. On 13 October 1998 pursuant to an application Glamour Land was added as another defendant. Apart from the action against Manjit Singh Saini being struck out, the court also ordered that the saman pemula be heard together with the writ. On 22 February 2005, on application as per encl. 76, the High Court allowed Malayan Banking to be the second plaintiff in the saman pemula, rather than as the fourth defendant. On 17 October 2005 the High Court decided against the appellant for both the actions, meting down the following orders:

a) the second plaintiff's claim in the writ be dismissed with costs;

b) the first plaintiff's claim (the appellant) from prayers (a) to (h) and (j) be dismissed;

c) the first respondent be ordered to pay the appellant the sum of RM65,450 with interest at 8% per annum from the date of filing the writ to the date of realization;

d) the appellant to pay costs to Malayan Banking and Glamour Land Sdn Bhd; and

e) there be no costs to the first respondent.

[4] Being dissatisfied with the High Court's decision, the appellant appealed to the Court of Appeal hence the matters before us.

[5] The two appeals filed at the Court of Appeal against the respondents were appeals W-01-99-05 in relation to the saman pemula (referred to as 'this appeal') and W-02-1236-05 (hereinafter referred to as the 'second appeal') in relation to Civil suit S(1)-22-208-1996 ('the writ'). The relevant respondent for these two appeals is Ng Pek Yuan with Malayan Banking and Glamour Land Sdn Bhd being secondary players. As the appeals were interconnected, the parties agreed that both appeals be heard simultaneously. Taken together the appeals could be described in this manner:

A The appellant's stance is that she contributed a certain amount of money to buy the property. She and the first respondent are co-owners and the latter holds her share under a resulting trust. The question to be resolved in relation to the appeal, pursuant to the writ, is to identify the amount contributed and whether indeed B there was a resulting trust. If the answer is positive the appellant will be entitled to her percentage of contribution. The first respondent's stance as regards her saman pemula is that the caveats cannot be filed by the appellant as she has no caveatable interest let alone no authorization has been obtained from the State Authority. That being so the caveats must be removed.

C

[6] Before proceeding with the appeals, by consent of the appellant, the appeals against Malayan Banking in W-01-99-05 and in the second appeal (W-02-1236-2005) were struck out with no costs here and below. The appellant also withdrew the appeal D against the Pendaftar Hakmilik Tanah W.P.K.L, and by consent without costs. As regards the costs ordered against the latter at the High Court, parties agreed that the decision would be deferred until the conclusion of the appeal.

E **[7]** At the end of the appeals we made the following orders, namely:

i. it was this panel's unanimous decision that the appeals be dismissed with costs (the effect would be that the caveat filed by appellant was ordered removed and that the appellant be F refunded to the sum of RM65,450 only);

ii. the High Court orders of these appeals be affirmed;

iii. the deposits were ordered toward account of taxed costs; and

G iv. as agreed, and with appeal W-01-99-2005 now dismissed, costs made against the Pendaftar Tanah at the High Court was ordered to remain unvaried.

Background Facts Of The Appeals

H

[8] The appellant and the first respondent were friends and business partners at one point of time. As early as late 1991 the first respondent, also known as Mrs Connie Choong, together with the appellant who is a Japanese citizen residing in Japan, had intended to set up a Japanese restaurant in Malaysia. The idea I soon crystallized into reality and a shop ie, the property was

acquired to house the restaurant. The property was secured by the first respondent on 6 March 1992, *vide* a sale and purchase agreement with one Mr. Lim, for a purchase price of RM950,000. A company called Ofukujaya Sdn Bhd was incorporated to run the Japanese restaurant, with the appellant holding 49% share in this company, and the first respondent holding a controlling 51% share.

[9] To finance the venture some monies were sent by the appellant from Japan to the first respondent. The appellant claimed that she had from time to time, not only contributed towards the share capital of the restaurant, but also towards the purchase price of the property. The alleged payments were as follows:

a) RM150,000 on 31 December 1992 by way of telegraphic transfer to the first respondent;

b) RM20,000 in April 1992 by cash to the first respondent;

c) RM17,950 in August 1993 by telegraphic transfer to the first respondent; and

d) RM26,660.48 from Kiku's money (the second plaintiff in the writ) held by the first respondent.

[10] The aggregate sum was RM214,610.48. Since the appellant and the first respondent did not have sufficient funds at that material time to pay for the full purchase price of the property, a loan was raised to finance the purchase. The lender was Perdana Finance Berhad. As security for this loan, a first legal charge was created in favour of Perdana Finance Berhad.

[11] Later, around the middle of 1994, the appellant discovered that the property was only registered in the name of the first respondent. To prevent the latter from dealing with the property, the appellant entered a private caveat which bore presentation no. 13274/94 (first caveat) on the property in December 1994, in force until 23 July 1996. In March 1996, the appellant's solicitor had attempted to enter another caveat on the property (second caveat), but rejected by the Kuala Lumpur Land Registrar as it disclosed 'no caveatable interests'. This caveat was thus never registered.

[12] As stated above, on 7 May 1996 the appellant filed Civil Suit S(1)-22-208-1996 (the writ), against the first respondent. In July 1996, on the basis of this writ action having been commenced against the first respondent, the appellant entered the third caveat ie, presentation 7267/96 against the property. The third caveat, though presented on 18 July 1996, was not registered until much later. Apparently it was held up by the land office for clarification of certain title number particulars and permitted to be registered later with retrospective effect. When caveat no. 7267/96 was not reflected, after searches were made at the Kuala Lumpur Land Office, the appellant lodged a fourth caveat ie, presentation no. 13038/96. In 2002, a fifth caveat was entered against the property, as caveat no. 7267/96 had expired through effluxion of time.

[13] Unbeknown to the appellant, sometime in June 1996 the first respondent had entered into a sale and purchase agreement with Glamour Land Sdn. Bhd, for the sale of the property. The latter then allegedly applied for a term loan founded on the security of the property. It transpired that as a result of caveat no. 7267/96 and all the intricacies that went with it, the Kuala Lumpur Land Office had rejected the registration of the memorandum of transfer between the first respondent and Glamour Land, and the charge between the latter and the bank, presented on 23 September 1996.

Target Of The Appellant

[14] The appellant's claim is only against the first respondent and not against Glamour Land or even Malayan Banking. Both these latter respondents are strangers to the agreement between the appellant and the first respondent as regards the property. The appellant's two main complaints are that in breach of the agreement between her and the first respondent, the latter had unlawfully registered the property in her sole name. The first respondent had also concealed that fact. And this want of registration of the appellant's name as a co-owner happened despite the request by the first respondent from the appellant for contributions towards the solicitors' fees, compensation payment to the vendor, quit rent, assessment and stamp duty involved in the purchase of the property, which the appellant promptly had contributed to. The above payments were in addition to the

appellant's contribution towards the purchase price. The first respondent had represented in writing to the appellant that the property would be 'for our food business' (RR 457-458).

[15] The registration issue apart, the appellant's next serious contention was that, sometime in mid-1996 the first respondent with *mala fide* intent, purportedly sold the property to Glamour Land for the sum of RM1,930,000 in an attempt to defeat her interest. The appellant had alleged that Glamour Land was not a *bona fide* purchaser and had colluded with the first respondent. It was further alleged that the owner of Glamour Land in fact was the husband of the first respondent. Glamour Land was averred to have attempted to create a legal charge on the said property in favour of Malayan Banking in order to defeat the appellant's interest.

Additional Contention Of The Appellant

[16] The proposal to buy and share a building emanated from the first respondent, resulting in the appellant contributing the above mentioned payments towards the purchase of the property. The first respondent was alleged to have consistently requested for her half share of payment towards the building; and the first respondent had admitted receiving the contribution. This half share issue is consistent with the first respondent's half beneficial interest in the property.

[17] The appellant submitted that, despite the appellant not having been registered as co-proprietor of the said property, in the circumstances of the case, a resulting trust had been created over the said property, entitling her to half share of the property.

Respondent's Defence

[18] The first respondent contended that the monies given by the appellant amounting to RM169,500 were operating costs of the restaurant. Since the appellant and the first respondent's monies were insufficient to bear the operating costs, a loan of RM200,000 was taken from Perdana Finance Berhad. The operating costs were more than that sum. In fact RM366,567 was spent to start the restaurant, with the first respondent ending up paying for the other expenses.

[19] Malayan Banking alleged that, on the request of Glamour Land and pursuant to a letter of offer dated 4 July 1996, it had granted a term loan for the sum of RM150,000 to the latter, *inter alia* to part finance the purchase of the property from the first respondent. By way of security for the term loan, Glamour Land had executed a first party legal charge over the said property, in favour of Malayan Banking.

[20] Prior to the presentation of memorandum of transfer and charge, Malayan Banking's solicitor had on 23 September 1996 conducted a search on the register document of title and the caveat register book, at the Kuala Lumpur Land Office. The said search revealed that the said property was free of encumbrances. Satisfied with that status the bank released the loan amount. On the same day Malayan Banking's solicitor presented the documents for registration. The land office on the other hand failed to register the aforesaid memorandum of transfer and memorandum of charge on the premise that a private caveat had been filed earlier by the appellant on 16 January 1996 as per presentation no. 7267/96.

[21] Glamour Land had averred that by a sale and purchase agreement dated 21 June 1996, it had agreed to purchase the property from the first respondent on the terms and conditions as set out therein and that the aforesaid transaction was *bona fide*. It denied any collusion with the first respondent to defeat the interest of the appellant over the property. Glamour Land admitted that in order to assist in financing the purchase of the property, it obtained a loan from Malayan Banking, and as security for the said loan, it was required to create a charge over the property. Glamour Land complained that it had suffered losses and damages arising from the lodgment of the caveats by the appellant.

Our Finding

[22] In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng* [1995] 2 CLJ 713 the Court of Appeal had stated that the onus was on the caveator ie, the appellant in this case to establish that she has a caveatable interest. In that case the court had clarified that the National Land Code created three categories of interest that may be protected by the entry of a private caveat. These categories were derived from s. 323(1) National Land Code 1965 and they read as follows:

(1) the persons and bodies at whose instance a private caveat may be entered are:

(a) any person or body claiming title to, or any registrable interest in, any alienated land … or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

(2) …

(3) Any application under this section shall be accompanied by:

(a) the prescribed fee;

(b) the grounds, giving rise to the claim thereto, verified by a statutory declaration by the applicant or his advocate and solicitor; and ...

(c) …

[23] Despite the width of those categories, it was our view that the current interest of the appellant faced a statutory obstacle, which impediment she had failed to overcome. It is indisputable that the appellant had failed to obtain the prior written approval of the State Authority as required under s. 433B(1)(c) read together with s. 433C of the National Land Code. Without that approval, even though beneficially entitled under the resulting trust over the property acquired by the first respondent, with no evidence adduced that the dealing was prior to 1 January 1993 or her case falling under s. 433B(1)(aa), (ab) and (ac), her attempt to lodge any caveat must necessarily fail. The caveats must be removed.

[24] However inequitable it may appear outwardly, it must be understood that the Torrens system, which is the very foundation of the National Land Code, is a complete bar to the attempts of the appellant to caveat her interest unless all the strict demands are complied with. With the promulgation of the amended provision any failure to comply with the strict requirements cannot be tempered with equity. In spite of that it does not exclude the courts jurisdiction to grant judicial relief in a claim *in personam* founded in law or in equity.

[25] Having perused the trial judge's findings we failed to detect any error in his judgment and agree that in the circumstances of the case, a resulting trust was created when the monies were funneled to the first respondent. The appellant here had entrusted her contribution with the first respondent, expecting her share and contribution to be used for her benefit in the joint venture. The fact that she was in Japan, and away from the hub of the business, let alone the respondent had been the party who had successfully persuaded her to part with her money, the first respondent was expected to register her as the co-owner of the property within the context of the business venture (*Abdul Karim a/l PUK Mohamed Seeni v. Tahir bin Yaacob & Anor* [2004] 3 CLJ 424). Whether expressed or implied, the appellant still retained her proprietary rights, never intending that her beneficial interest be taken away from her, and that the interest in the contribution to eventually revert to her when she demands it back. It must be understood that this was a business venture with profit being uppermost in everyone's mind; charity had no place in such a back ground.

[26] No evidence was adduced by the first respondent to rebut the creation of this resulting trust. The appellant's contribution was never established as a loan, proved for the benefit of the first respondent, contrary to law or public policy or provide any reason to rebut it as a resulting trust (*Palaniappa Chettiar v. Arunasalam Chettiar (No. 2)* [1962] AC 294). This resulting trust is a valid legal interest in law (*Malaysian Trust Law* by Mary George p. 221).

[27] Up to this stage, be it the transfer of money, the running of the Japanese restaurant, or even the joint venture *per se*, the trust being in conflict with any law had yet to confront the appellant. Everything was above board. She was entitled to the benefits of the venture and protection of the law. In the event of any breach by the first respondent, the courts will certainly be at hand to render assistance to the appellant, as equity will not suffer a wrong to be without remedy.

[28] There was no evidence of any illegal intent on the part of the appellant when she agreed to the entrepreneurial undertaking, as proposed by the first respondent nor was any evidence adduced to establish that she was aware of any legal impediment, causing her share to be exposed and unprotected. Matters came to a head only when she discovered that she was not a registered

co-owner of the property, but even that, only after a search was carried out. She later came to know too that the property was to be sold to Glamour Land, a company which was partly owned by the husband of the first respondent.

[29] At the risk of being repetitive, it was at the phase when the lodgment of the caveats was in the process, that she faced a statutory wall, as she had failed to obtain the required authorization from the State Authority. As said earlier, the appellant was caught by the restrictions in ss. 433B(1)(c) and 433C of the National Land Code, with the former provision wide enough to cover her predicament as she is a non-citizen beneficiary of an alienated land. With the appellant's failure to comply with the above provisions, hence prohibited from having a caveatable interest under the National Land Code, the first respondent would be permitted to sell the property to whomsoever she wishes.

[30] Despite the often quoted statement that equity follows the law, and the appellant is not without remedy, she still has to establish her claim (*Chai Kim Chong v. Barnwood Sdn Bhd* [1994] 2 MLJ 56). Here even though we were satisfied that a resulting trust had been created when the first respondent received the contributions from the appellant, regretfully what her share was out of the value of the property was not successfully established by the appellant. In such a circumstance the appellant's claim will have to be confined to recovery of actual sums of money contributed by her to the first respondent. Even though the first respondent failed to appear at the trial, and all allegations made against her were deemed to be admitted, there was sufficient rebuttable evidence to reduce the claimed sum to that of RM65,450 only.

[31] The oral and documentary evidence adduced by the appellant, had established that she had contributed a sum of RM65,450 towards the purchase of the property by giving or transferring monies to the first respondent. In fact this sum was clearly acknowledged by the appellant herself in a form of a written agreement dated 12 September 1994 made at a subsequent meeting between herself and many others, including the first respondent. In this document she had declared:

A I, Takako, only wish to record here that I have paid RM 47,500 (being 5% of RM 950,000.00) and RM 17,950 (being my half share of the additional payment to the vendor) **in respect of the building.** The total amount is RM 65,450.00 (emphasis added).

B **[32]** The above sum was further reflected in the appellant's statutory declaration affirmed on 19 September 1994 when lodging the first caveat. She affirmed that she had only paid RM47,500 and RM17,950 making a total sum of only RM65,450 to the first respondent for the purchase of the property.

C **[33]** Based on the above reasons this panel had unanimously dismissed these appeals with costs. The detailed orders have been laid down earlier as above.

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